83-451

Docket Number _____

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IN THE SUPREME COURT OF

THE UNITED STATES

BERT JUNIOR WILSON,

Petitioner-Appellant,

vs.

COMMISSIONER OF
INTERNAL REVENUE
SERVICE,

Respondent-Appellee

ON APPEAL FROM THE DECISION OF THE

UNITED STATES COURT OF APPEALS,

TENTH CIRCUIT

JURISDICTIONAL STATEMENT

BERT JUNIOR WILSON
Petitioner-Appellant
(Individually and
without counsel)
Route #1, Box 150
Solomon, Kansas 67480

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Docket Number _____

IN THE SUPREME COURT OF THE UNITED STATES

BERT JUNIOR WILSON,

Petitioner-Appellant,

vs.

COMMISSIONER OF INTERNAL REVENUE SERVICE,

Respondent-Appellee

ON APPEAL FROM THE DECISION OF THE UNITED STATES COURT OF APPEALS, TENTH CIRCUIT

JURISDICTIONAL STATEMENT

Bert Junior Wilson, Petitioner-Appellant, appeals from the decision of the United States Court of Appeals, Tenth Circuit, sustaining federal income tax deficiencies levied for the year 1976 in the amount of $13,460.60 and for 1977 in the sum of $30,302.00 together with interest and penalty. Such levied taxes, together with interest

and penalty, have been paid by Petitioner-Appellant, under protest.

QUESTIONS PRESENTED BY THE APPEAL

Petitioner-Appellant contends that income earned from his farming operation and chicken/poultry business for the taxable years of 1976 and 1977 was "earned income" and subject to the maximum tax liability of 50% and not the maximum of 70% as assessed by the Internal Revenue Service.

Petitioner-Appellant contends that "capital" was not substantial material income-producing factor when weighed with the substantial work efforts, expertise, and invaluable knowledge expended by Petitioner-Appellant to make his business operation a success. Petitioner-Appellant was irreplaceable in his business enterprise. It was recognized by the Tax Court that Petitioner-Appellant's personal efforts comprised from 80% to 90% of the farm's gross income.

Petitioner-Appellant contends that the levying of additional taxes against him for

the years 1976 and 1977, together with the assessed interest and penalty, was unfair and unjust as his income for the years in question was "earned" income subject to the maximum tax liability of 50%. In this regard, the payment of such taxes, plus interest and penalty, made under protest, should be ruled by this Court as unjustly collected and such amounts should be reimbursed to Petitioner-Appellant.

Petitioner-Appellant alleges that he was unfairly denied his "day in court" inspite of his written requests that he be allowed to present his case with oral arguments before the U.S. Court of Appeals, Tenth Circuit. Thus, as Petitioner-Appellant has made his appeal individually, and without counsel, he should be allowed the constitutional right of presenting his arguments orally before this Court.

PRELIMINARY STATEMENT

Petitioner-Appellant's appeal from the additional tax assessment levied by the

Internal Revenue Service was first tried before the Honorable William A. Goffe, in Denver, Colorado, on February 17, 1981. Oral testimony was given during such trial.

The Memorandum Findings of Fact and Opinion of the United States Tax Court was filed May 24, 1982, and the Decision of the United States Tax Court was entered June 14, 1982. Petitioner-Appellant had originally filed his petition before the United States Tax Court on March 17, 1980.

An appeal to the United States Court of Appeals for the Tenth Circuit was timely mailed and filed of record on August 24, 1982.

The decision of the United States Court of Appeals for the Tenth Circuit was recorded April 29, 1983, without the granting of Petitioner-Appellant's motion and request to present his arguments orally and to have his day-in-court. Such decision affirmed the ruling of the United States Tax Court.

On May 21, 1983, Petitioner-Appellant

filed his motion and request for a new trial and presentation of oral arguments before the U.S. Court of Appeals for the Tenth Circuit.

On June 15, 1983, the U.S. Court of Appeals for the Tenth Circuit ruled that the petition for rehearing as filed by the Petitioner-Appellant was denied.

A timely notice of appeal, pursuant to Rule 11 of the United States Supreme Court, was then filed by the Petitioner-Appellant with the U.S. Court of Appeals for the Tenth Circuit that his case be heard and tried by the United States Supreme Court.

FACTS

The crux of the issue before the Court is whether "capital" was a material income-producing factor in Petitioner/Appellant's farming operations and if a "substantial portion" of the gross income of the business is attributable to the employment of capital as opposed to a "substantial portion" of the income being directly earned by Petitioner/

Appellant through his extensive labors, total dedication, and the fact he was irreplaceable to the business operation and its success.

The Internal Revenue Service argues that because Petitioner/Appellant had spent a number of years working day and night to build board by board by his own personal labors the numerous chicken houses used in his poultry operation, the fact that he installed bolt by bolt and maintained individually without outside hired labor the machinery used within the chicken houses and poultry plant, that such equipment in itself constituted a "substantial portion" of the income-producing factor creating his earned income.

Section 1.1348-3(a)(3)(ii) of the Treas. Reg. provides:

(ii) Whether capital is a material income-producing factor must be determined by reference to all of the facts of each case. Capital is a material income-producing factor if a substantial portion of the gross income of the business is attributable to the employment of capital in the business, as reflected, for example, by a substantial in-

vestment in inventories, plant, machinery, or other equipment. In general, capital is not a material income-producing factor where gross income of the business consists principally of fees, commissions, or other compensation for personal services performed by an individual. Thus, the practice of his profession by a doctor, dentist, lawyer, architect, or accountant will not, as such, be treated as a trade or business in which capital is a material income-producing factor even though the practitioner may have a substantial capital investment in professional equipment or in the physical plant constituting the office from which he conducts his practice since his capital investment is regarded as only incidental to his professional practice.

In the United States Tax Court's Memorandum Findings of Fact and Opinion, page 9, the Court stated:

"A VERY HIGH PROPORTION OF THE FARM'S GROSS INCOME--PERHAPS 80 to 90 PERCENT--WAS UNDOUBTEDLY THE RESULT OF PETITIONER'S EFFORTS." (Emphasis added.)

The Treasury Regulation states "Capital is a material income-producing factor if a substantial portion of the gross income of the business is attributable to the employment of capital in the business. . ." The United States Tax Court recognized that Petitioner/Appellant's personal contribution

of time, energy and unending labors were the proximate cause for the business's success. As the Treasury Regulation states "all the facts of each case must be considered to determine if capital is a material income-producing factor. . .", the trial court erred in failing to recognize that Petitioner/Appellant was irreplaceable to his business operation, that the gross income earned was mainly through his personal efforts, and that it was not the employment of capital that attributed substantially to the earning of income.

The trial court erred in failing to consider the case of Home Interiors and Gifts, Inc., 73 TC #92. Such case is comparable to Petitioner/Appellant's situation. In the cited case, the Tax Court ruled that the family member was IRREPLACEABLE and thus was the reason for the success of the business. Thus, the income of the family member was treated as "earned income" and taxed at the maximum rate of 50% rather than unearned in-

income with a maximum tax rate of 70%.

Additionally, the trial court erred in failing to apply the case of Vita-Food Corp. v. Commissioner of Internal Revenue, 238 F.2d 359. It was determined that the manager was the founder and heart and soul of the corporation, and the income earned by the corporation was indeed mainly through the manager's personal efforts.

Petitioner-Appellant alleges that though depreciation on the buildings and machinery used in the poultry operation was an offset in the calculation of his gross income for the years 1976-77, such capital investments were not the proximate basis for his business earnings. The success of and the profits derived through Petitioner-Appellant's poultry and farming operation were almost solely attributable to his extensive personal labors and the fact he was irreplaceable in the knowledge, expertise, and expended time and labors to make his business operation successful. This fact is fully evi-

denced by the realization that similar businesses during the years 1976-77 either failed completely or grossly lost profits while Petitioner-Appellant through his extended efforts realized a profit. Such comparable business of like nature and size as Seymour Foods of Topeka, Kansas, and Gates Poultry Plant of Denver, Colorado, went bankrupt or closed the same years Petitioner-Appellant was being successful.

CONCLUSION

Petitioner-Appellant respectfully requests this Court to make the following findings and rulings:

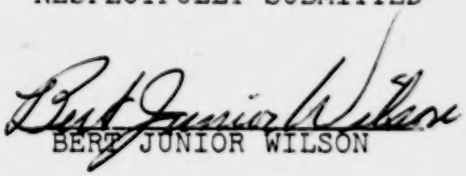
1. That Petitioner-Appellant was irreplaceable to his business operation and that the income derived from such poultry operation for the years 1976-77 should be termed "earned income" subject to the maximum tax liability of 50%.

2. That Petitioner-Appellant be granted his day-in-court and the right to present his oral arguments before this Court at the

time of hearing such case.

3. That the tax liability, together with interest and penalty, assessed for the years 1976-77 and paid by Petitioner-Appellant under protest should be refunded to him.

RESPECTFULLY SUBMITTED



BERT JUNIOR WILSON

APPENDIX

1. U.S. Court of Appeals, Tenth Circuit, Denial of Petition for Rehearing..... A

2. Petitioner/Appellant's Motion for a New Trial and Presentation of Oral Arguments before the U.S. Court of Appeals..... B

3. Decision of the U.S. Court of Appeals, Tenth Circuit..... C

4. Petitioner-Appellant's Memorandum and Brief to the U.S. Court of Appeals..... D

5. Notice of Appeal to the U.S. Supreme Court..... E

MAY TERM - June 15, 1983

Before Honorable Oliver Seth, Chief Judge, Honorable James K. Logan and Honorable Stephanie K. Seymour, Circuit Judges, United States Court of Appeals

BERT JUNIOR WILSON, Petitioner-Appellant, and DELORES J. WILSON, Petitioner, v. COMMISSIONER OF INTERNAL REVENUE SERVICE, Respondent-Appellee.	)	No. 82-2048

This matter comes on for consideration of the appellant's motion to file a petition for rehearing out of time and his petition for rehearing.

The motion to file out of time is granted.

As for the petition for rehearing, the appellant has not presented any points of law or fact which the court has overlooked or misapprehended. Accordingly, the petition for rehearing is denied.

HOWARD K. PHILLIPS, Clerk

By /s/ Robert L. Hoecker
Robert L. Hoecker
Chief Deputy Clerk

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

BERT JUNIOR WILSON, Petitioner-Appellant,	)	
vs.	)	Docket Number
COMMISSIONER OF INTERNAL REVENUE SERVICE, Respondent-Appellee,	)	#82-2048

MOTION FOR A NEW TRIAL AND

PRESENTATION OF ORAL ARGUMENTS

Petitioner-Appellant, Bert Junior Wilson, hereby moves the Court for a retrial in the above-entitled matter and for the right to present oral arguments before the court.

Petitioner-Appellant alleges that the Court erred in not granting his specific request to present oral arguments before the Court.

Petitioner-Appellant further alleges that the Court erred in failing to grant Petitioner-Appellant his constitutional right to have his day in court.

Petitioner-Appellant alleges the Court erred in failing to consider the cases cited

in his brief substantiating his allegation that he was irreplaceable in his poultry operation and his income was in fact earned income.

Petitioner-Appellant maintains this motion for a new trial and right to present oral arguments should be granted in light of the fact that the court failed to use Petitioner-Appellant's current address in mailing the prior findings of the court and such was not delivered to him until May 11, 1983. Petitioner-Appellant's current address had been presented to the court by prior correspondence. Due to the incorrect address and postal delay in delivering the findings of the court, it was impossible for the Petitioner-Appellant to meet the 14-day deadline for requesting a new trial.

/s/ Bert Junior Wilson
BERT JUNIOR WILSON

Petitioner-Appellant, Bert Junior Wilson, hereby certifies that on the 21st day

of May, 1983, he mailed by ordinary mail a copy of the foregoing motion to: Michael L. Paup, Chief, Appellate Section, U.S. Department of Justice, Tax Division, Washington, D.C. 20530, and Cynthia J. Olson, Attorney, 20th Floor, 1050-17th Street, Denver, Colorado 80265, attorneys for the Internal Revenue Service.

/s/ Bert Junior Wilson
BERT JUNIOR WILSON

NOT FOR ROUTINE PUBLICATION

UNITED STATES COURT OF APPEALS

TENTH CIRCUIT

FILED
United States Court of Appeals
Tenth Circuit

APR 29 1983

HOWARD K. PHILLIPS
Clerk

BERT JUNIOR WILSON,
Petitioner-Appellant,
DELORES J. WILSON,
Petitioner,

v.

COMMISSIONER OF INTERNAL REVENUE SERVICE,
Respondent-Appellee.

No. 82-2048

APPEAL FROM THE UNITED STATES TAX COURT

Submitted on the briefs pursuant to Tenth Circuit Rule 9:

Bert Junior Wilson, pro se.

Glenn L. Archer, Jr., Assistant Attorney General, Michael L. Paup, Gary R. Allen, and Bruce R. Ellisen, Attorneys, Tax Division, Department of Justice, Washington, D.C., for Respondent-Appellee.

Before SETH, Chief Judge, LOGAN and SEYMOUR, Circuit Judges.

PER CURIAM.

This three-judge panel has determined unanimously that oral argument would not be of material assistance in the determination of this appeal. See Fed.R.App.P. 34(a); Tenth Circuit R. 10(e). The cause is therefore ordered submitted without oral argument.

Petitioner Bert Junior Wilson[1] appeals the decision of the tax court sustaining the assessment by the Commissioner of Internal Revenue of a tax deficiency for the years 1976 and 1977. The court determined that capital was a material income-producing factor of the profits realized in the operation of his egg-producing business resulting in a determination that not all of the profits were entitled to the benefit of the maximum

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1. Mr. Wilson's former wife was a party to the tax court proceeding solely because she filed joint returns with him for the years in question. We therefore will refer only to Mr. Wilson.

tax for "earned income" under 26 U.S.C. § 1348.[2] We affirm.

The petitioner had operated an egg-producing business since 1946. During 1976 and 1977 he operated a farm which produced and sold livestock, poultry, eggs, grain and hay. His net income from farming was $195,733 for 1976 and $239,359 for 1977. The petitioner treated all of the net income as "earned income" for purposes of the maximum tax provisions of 26 U.S.C. § 1348. The Commissioner determined that capital was a material income-producing factor in the petitioner's business and issued notices of deficiency allowing only thirty percent of the petitioner's net farm income to be treated as earned income, pursuant to § 1348(b)(1). The tax court agreed.

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2. Section 1348 has been repealed for taxable years beginning after 1981. Economic Recovery Tax Act of 1981, Pub. L. No. 97-34, 95 Stat. 172.

The tax court found, and the petitioner does not dispute that,

> Prior to and including the years in issue, petitioner made investments in equipment, structures, and machinery in connection with the operation of his farm. Petitioner's major farm activity was raising chickens to "laying age" (i.e., the age when they become capable of producing eggs) and collecting and processing the eggs which they laid. The birds were kept in "chicken houses" large structures of tin and wood. Petitioner used a significant amount of equipment to maintain the chickens' health . . . ventilators kept the hens cool . . .; automatic feed grinders ground and mixed various grains into chicken feed according to formulas which petitioner developed. The egg-producing operation was highly automated, using expensive machinery to speed the eggs from the hens to the egg crates. Petitioner purchased a "semi" (a large tractor-trailor rig) for over $30,000 and used it to haul the crated eggs to market.

The total book value of assets on which the petitioner claimed depreciation in 1976 and 1977 was $449,824.81 and $377,501.71, respectively. There is no doubt, and the tax court found, that the success of the petitioner's business was due to the tremen-

dous personal effort and skill of the petitioner.

For the tax years in question, § 1348 provided that the maximum federal income tax rate on "earned income" was fifty percent. Section 1348(b)(1)[3] adopted, for purposes of that section, the definition of earned income found in § 911(b).

> (b) Definition of earned income.--For purposes of this section, the term "earned income" means wages, salaries, or professional fees, and other amounts received as compensation for personal services actually rendered . . . . In the case of a taxpayer engaged in a trade or business in which both personal services and capital are material income-producing factors, under regulations prescribed by the Secretary . . ., a reasonable allowance as compensation for the personal services rendered by the taxpayer, not in excess of 30 percent of his share of the net profits of such trade or business, shall be considered as earned income.

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3. For taxable years beginning after 1978, § 1348(b)(1) was amended to eliminate the thirty percent limitation on earned income derived from a trade or business in which capital was material. Rev. Act of 1978, Pub. L. No. 95-600, 92 Stat. 2878.

The Regulations state,

> (3) Earned income from business is which capital is material . . .
>
> (ii) Whether capital is a material income-producing factor must be determined by reference to all the facts of each case. Capital is a material income-producing factor if a substantial portion of the gross income of the business is attributable to the employment of capital in the business, as reflected, for example, by a substantial investment in inventories, plant, machinery, or other equipment. In general, capital is not a material income-producing factor where gross income of the business consists principally of fees, commissions, or other compensation for personal services performed by an individual. Thus, the practice of his profession by a doctor, dentist, lawyer, architect, or accountant will not, as such, be treated as a trade or business in which capital is a material income producing factor even though the practitioner may have a substantial capital investment in professional equipment or in the physical plant constituting the office from which he conducts his practice since his capital investment is regarded as only incidental to his professional practice.

Treas. Reg. § 1.1348-3(a)(3)(ii).

The regulation adheres to the general rule found in the cases. In Rousku v. Commissioner, 56 T.C. 548, 550-551 (1971),

involving an automobile repair shop, the court stated,

> Capital is a material income-producing factor if a substantial portion of the gross income of the business is attributable to the employment of capital in the business conducted by the enterprise. Moreover, capital is ordinarily a material income-producing factor if the operation of the business requires substantial inventories or substantial investments in plant, machinery, or other equipment. On the other hand, capital is not a material income-producing factor where the gross income of the enterprise consists principally of fees, commissions or other compensation for personal services.

See Holland v. Commissioner, 622 F.2d 95 (4th Cir. 1980) (a maintenance contracting business); Gaudern v. Commissioner, 77 T.C. 1305 (1981) (a bowling supplies business); Moore v. Commissioner, 71 T.C. 533 (1979) (a grocery business). See also Rev. Rul. 74-597, 1974-2 C.B. 272. Cf. Bruno v. Commissioner, 71 T.C. 191 (1978) (capital was incidental to practice of bail bondsman).

We do not doubt the petitioner's argument that without his personal abilities and

labor, his business would not have been successful. However, we must agree with the tax court that under the test enunciated by the regulations and the cases that capital was a material income-producing factor. As stated by the tax court,

> [T]he petitioner employed a very substantial amount of assets in his egg-producing business, without which it could not have operated. Chicken houses and cages were needed to house the laying hens, ventilators, automatic feed grinders, and manure pumps were needed to maintain their health. The egg processing required much automated equipment. The chickens themselves were perhaps the most valuable asset of the operation. A large "semi" was required to haul the eggs to market.

A "substantial portion of the gross income . . . is attributable to the employment of capital."

Accordingly, the order of the tax court is affirmed.

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

BERT JUNIOR WILSON and DELORES J. WILSON, Petitioners-Appellant,	)	
vs.	)	Docket Number
COMMISSIONER OF INTERNAL REVENUE SERVICE, Respondent-Appellee	)	#82-2048

PETITIONER-APPELLANT'S MEMORANDUM

Petitioner-Appellant Bert Junior Wilson presents to the Court his Brief setting forth the issues at question and requesting this Court to specifically find that his income for the years 1976-77 was earned income, subject only to the maximum 50% tax liability; that this Petitioner-Appellant has no additional tax liability for the years 1976-77 due to the Internal Revenue Service; and that oral arguments be granted in the hearing of this matter before the Court.

As Petitioner-Appellant is no longer operating the poultry business and does not net the profits his extensive labors earned during the years 1976-77 while individually

administering the poultry business, he cannot afford legal counsel to represent him in this appeal. Additionally, Petitioner-Appellant does not have the legal expertise to research law and cite pertinent legal cases to aid in his defense. Written word cannot fully describe the innumerable menial tasks he undertook singlehandedly, nor the formidable stench he constantly worked in and endured daily in order to make his poultry business a one-man success. To substantiate Petitioner-Appellant's position that his income for the years in question was truly earned and subject only to the maximum 50% tax liability, he must be given an opportunity to present his defenses orally before this Court. Failure to grant oral arguments would jeopardize his constitutional rights.

Respectfully submitted,

/s/ Bert Junior Wilson
BERT JUNIOR WILSON
Petitioner-Appellant
Route #1, Box 150
Solomon, KS 67480

CERTIFICATE OF MAILING

I, Bert Junior Wilson, do solemnly swear that on the 29th day of December, 1982, by certified mail, return receipt requested, I forwarded to Mr. Glenn L. Archer, Jr., Assistant Attorney General, and Mr. Michael L. Paup, Chief, Appellate Section, Tax Division, U.S. Department of Justice, Washington, D.C. 20530, three copies of the foregoing Memorandum and Brief for Petitioner-Appellant.

/s/ Bert Junior Wilson
BERT JUNIOR WILSON

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

BERT JUNIOR WILSON and DELORES J. WILSON, Petitioners-Appellant,	)	
vs.	)	Docket Number
COMMISSIONER OF INTERNAL REVENUE SERVICE, Respondent-Appellee,	)	#82-2048

BRIEF FOR PETITIONER-APPELLANT

BERT JUNIOR WILSON
Route #1, Box 150
Solomon, KS 67480

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Capital investments contributed less than 20% as being a material income-producing factor. Petitioner's personal labors and efforts constituted more than 80% of the gross income. Capital was not a substantial income-producing factor. Petitioner's income for 1976-77 is properly classified as earned income and subject only to the maximum 50% tax liability . .	7
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UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

BERT JUNIOR WILSON and DELORES J. WILSON, Petitioners-Appellant,	)	
vs.	)	Docket Number
COMMISSIONER OF INTERNAL REVENUE SERVICE, Respondent-Appellee	)	#82-2048

BRIEF FOR PETITIONER-APPELLANT

PRELIMINARY STATEMENT

This case was tried before the Honorable William A. Goffe in Denver, Colorado, on February 17, 1981. The case involves alleged deficiencies in income tax totaling $13,460.60 for 1976 and $30,302.00 for 1977. Oral testimony was given during such trial, and seriatim briefs submitted by petitioners and respondent.

The Memorandum Findings of Fact and Opinion of the United States Tax Court was filed May 24, 1982, and the Decision of the United States Tax Court was entered June 14,

1982. An appeal to the United States Court of Appeals for the Tenth Circuit was mailed on August 20, 1982, by Petitioner-Appellant and filed of record on August 24, 1982.

QUESTION PRESENTED

1. Whether, within the meaning of section 1348 of the Internal Revenue Code of 1954, capital was a material income-producing factor in petitioners' farming operations and if a substantial portion of the gross income of the business is attributable to the employment of capital as opposed to a substantial portion of the income being directly earned by petitioner's deligent business expertise, personal dedication and extensive labors to make the operation a success.

PETITIONER-APPELLANT'S REQUEST

FOR FINDINGS OF FACT

1. After review of the briefs, transcripts, and tax returns comprising the basis for this appeal, Petitioner-Appellant requests the Court to find that the income derived from the poultry-farming operation of the Petitioner-Appellant during the years 1976-77 was earned income.

a. The income earned during the years 1976-77 was due substantially to the personal efforts of the Petitioner-Appellant and not received because of capital investments in the business.

b. A substantial portion of the gross income to the business for the years 1976-77 was not attributable to the employment of capital in the business as defined in Treas. Reg. § 1,1348-3(a)(3)(ii).

2. The treatment of income to the business operation of Petitioner-Appellant for the years 1976-77 was correctly classified as "earned" income and thus subject only to

the maximum 50% tax liability.

3. Petitioner-Appellant has no additional tax liability for the years 1976-77.

POINTS RELIED UPON

Before capital is considered a material income-producing factor, all facts of each case must be closely weighed and evaluated. Only when a "substantial" portion of the gross income of the business is attributable to the employment of capital in the business does capital become a material income-producing factor.

It was the determination of the United States Tax Court that eighty to ninety percent of the farm's gross income was undoubtedly the result of Petitioner-Appellant's personal efforts. Thus, if capital produced ten to twenty percent of the gross income, such is not a "substantial" portion of the gross income, and does not qualify the gross income to be considered produced by capital investments. Rather, the facts presented substantiate that such gross income was earned by the Petitioner-Appellant and qualifies for the fifty percent maximum tax liability.

ARGUMENT

Section 1.1348-3(a)(3)(ii) of the Treas. Reg. provides:

(ii) Whether capital is a material income-producing factor must be determined by reference to all of the facts of each case. Capital is a material income-producing factor if a substantial portion of the gross income of the business is attributable to the employment of capital in the business, as reflected, for example, by a substantial investment in inventories, plant, machinery, or other equipment. In general, capital is not a material income-producing factor where gross income of the business consists principally of fees, commissions, or other compensation for personal services performed by an individual. Thus, the practice of his profession by a doctor, dentist, lawyer, architect, or accountant will not, as such, be treated as a trade or business in which capital is a material income-producing factor even though the practitioner may have a substantial capital investment in professional equipment or in the physical plant constituting the office from which he conducts his practice since his capital investment is regarded as only incidental to his professional practice.

Capital is a material income-producing factor if a substantial portion of the gross income of the business is attributable to the employment of capital in the business, as reflected, for example, by a substantial investment in inventories, plant, machinery, or other equipment." (Emphasis added.)

Respondent argues that it was the plant, machinery or other equipment of the chicken raising/egg producing business operated by the Petitioner-Appellant that was the material factor in producing the income earned by the Petitioner-Appellant in the years 1976-77.

Petitioner-Appellant argues that the greater portion of his income was earned NOT by capital investments in the business but by his own laborious efforts, backbreaking work, grueling 16-hour days for 365 days per year for 35 years, business expertise and rare knowledge of the business operation. The chicken houses, ventilators, feed grinders, manure pumps, etc., used in the chicken business, though installed bolt by bolt, board by board, and nail by nail by the Petitioner-Appellant without any outside expert assistance, did not produce a substantial portion of the gross income of the business as alleged by Respondent-Appellee. All such "capital investment" remain today in the

same state as in 1976-77, but are producing no income. They remain functional but idle as Petitioner-Appellant has withdrawn his manual labors and business expertise which were the principal and practically sole reason for the success of his operation. A substantial portion of the gross income earned by Petitioner-Appellant in 1976-77 was solely through his constant dedication, business expertise, and manual labors to make the operation a success.

As was outlined in the United States Tax Court "Menorandum Findings of Fact and Opinion", Petitioner-Appellant's business was a success because of the "tremendous amount of personal effort which he invested in it. . . He built the chicken houses himself. . . He did all of the carpentry, plumbing and electrical work, and most of the maintenance. . . He hauled the eggs to market and raised, ground and mixed his own feed. He took no vacations or even 15-minute 'coffee breaks'. He had trouble hiring competent employees

and consequently often had to do the work of two people on the processing line. He had to pump out the large quantities of chicken manure which collected under the cages. The small was unbelievable. The chickens consumed all of the Petitioner's time and energy. . ."

When comparable businesses of like nature and size, i.e., Seymour Foods of Topeka, Kansas, and Gates Poultry Plant of Denver, Colorado, went bankrupt or closed the same years Petitioner-Appellant's business was making good income, it becomes even more apparent that it was Petitioner-Appellant's contribution of labor and expertise and not that of material investments in capital which made the diference between success and bankruptcy. It was Petitioner-Appellant's ability and knowledge of proper formulas which he created for feeding the poultry which contributed to the net income earned because of lower feed costs per hen; it was his ability to be his own plumber, electrician, carpenter,

vaccinator, repairman, truck driver, and feed manufacturer which made his business a success when others with greater capital investments failed. Thus, a substantial portion of the gross income earned by Petitioner-Appellant during 1976-77 did not derive from capital investments. Such capital investments were merely incidental to the business operation.

The capital investments of such professionals as doctors, dentists, lawyers, etc., are purchased and used for the making of income but are treated as "incidental" by the Internal Revenue Service. The equipment termed by IRS as "capital investments" used by the Petitioner-Appellant was built or installed by him through calloused hands, sweat of the brow, tedious hours, board by board, nail by nail, splinter by splinter, and likewise should be treated as "incidental" to petitioner's operation and not the factor of producing a "substantial portion" of the gross income for it did not. A careful re-

view of the facts clearly evidence the truth that Petitioner-Appellant's income was earned substantially through personal efforts of labor and dedication to the business and not substantially earned by capital investments.

In the case of Home Interiors and Gifts, Inc., 73 TC #92, the income of the family member was treated as earned income because of the expertise and knowledge contributed by that member of the family enterprise which made them irreplaceable and thus was the reason for the success of the business. Likewise, the business expertise, labors and knowledge contributed by the Petitioner-Appellant to his business were the primary factors for the poultry operation being a success, and not the capital investment of equipment and machinery.

In the case of Vita-Food Corp. v. Commissioner of Internal Revenue, 238 F.2d 359, it was found that "The Tax Court erred in affirming Internal Revenue Commissioner's

determination disallowing deduction of amount of compensation paid by vitamin manufacturing corporation to its manager in computing its excess profits taxes as unreasonable and not in fact paid for personal services actually rendered by him, where he was the founder and heart and soul of the corporation, his ideas controlled both manufacture and distribution of its vitamins, he consummated sale of its formula and tradename to vitamin distributing corporations without compensation, and manufacturing corporation had large surplus after paying his compensation and other charges, including federal taxes." (Emphasis added.)

Petitioner-Appellant was the founder, heart and soul of his poultry operation. He was IRREPLACEABLE. When blizzards struck in the winter months, there was no one else to provide for the care of the poultry to keep them from freezing; when heat waves struck in the summer months, there was no one else to oversee the cooling of the chicken houses

during the 24-hour periods of each day. There was no one else to maintain the equipment necessary to provide a controlled temperature for the chickens. There was no one else with the knowledge to formulate the proper feed ingredients and grind the various grains in proper portions so the chickens could be fed to have faster gains at less costs. There was no one else to contact buyers, consummate sales, and haul eggs to market. There was no one else that could replace Petitioner-Appellant in the required maintenance and building of the poultry business as all plumbing, carpentry, mechanical and electrical work was done by him to save expenses.

In the cited case of Vita-Food Corp. v. Commissioner of Internal Revenue, 238 F.2d 359, the court found that the manager was "the founder of the corporation and continued to be its heart and soul during the period involved. His ideas controlled not only manufacture, but distribution of the product. . . . The record seems to show, if it had not

been for Mr. Lewis (the manager), there would have been little or no earnings." (Emphasis added.)

Petitioner-Appellant likewise was the founder of his personally-owned business, he was the heart and soul of it, his ideas controlled all aspects of the poultry operation, and if it had not been for him, there would have been little or no earnings.

Congress has now recognized the unfairness of Section 911(b) of the Internal Revenue Code and such restriction as the 30 percent of the net income maximum tax treatment was repealed by The Economic Recovery Tax Act of 1981.

Section 1.1348-3(a)(3)(ii) of the Treas. Regs. stresses that all the facts of each case must be considered to determine if capital is a material income-producing factor. If a substantial portion of the gross income of the business is attributable to the employment of capital in the business, then capital is a material income-producing factor.

In the United States Tax Court's Memorandum Findings of Fact and Opinion, on page 9, it is stated:

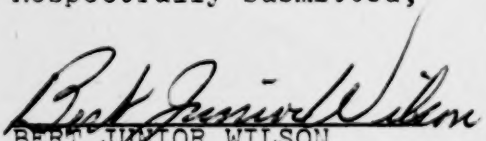
"A VERY HIGH PORPORTION OF THE FARM'S GROSS INCOME--PERHAPS 80 to 90 PERCENT--WAS UNDOUBTEDLY THE RESULT OF PETITIONER'S EFFORTS." (Emphasis added.)

Neither 10 nor 20 percent of the gross income earned in the years 1976-77 constitute a "substantial portion of the gross income" to consider that "capital" is a material income producing factor in Petitioner-Appellant's poultry operation. Thus, Petitioner-Appellant was correct in the filing of his tax returns for the years 1976-77 in determining that 50 percent of the net income was properly considered as "earned income".

CONCLUSION

The United States Circuit Court of Appeals is thus requested to rule that a substantial portion of the gross income earned by Petitioner-Appellant in the years 1976-77 was due solely to his efforts, that he was irreplaceable to the operation of his business, and he be entitled to consider such income as earned with a maximum 50 percent tax liability. The Court is further requested to rule that no additional tax liability or penalties be assessed against him under the now-repealed Section 1348 of the Treas. Reg.

Respectfully submitted,



BERT JUNIOR WILSON
Petitioner-Appellant

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

BERT JUNIOR WILSON, Petitioner-Appellant,	)	
vs.	)	Docket Number
COMMISSIONER OF INTERNAL REVENUE SERVICE, Respondent-Appellee,	)	#82-2048

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

Notice is hereby given that the Petitioner-Appellant, Bert Junior Wilson, does appeal to the Supreme Court of the United States, from the decision rendered by this Court in its opinion filed April 28, 1983, and the denial by this Court of Appellant's request for rehearing filed June 15, 1983.

Dated this 10th day of September, 1983.

Bert Junior Wilson

Bert Junior Wilson

CERTIFICATE OF MAILING

I, Bert Junior Wilson, hereby certify that on the 10th day of September, 1983, I mailed a copy of the foregoing Notice by

certified mail, return receipt requested, to the attorney for Respondent-Appellee: Mr. Glenn L. Archer, Jr., Tax Division, Appellate Section, Department of Justice, Washington, D.C. 20530.

Bert Junior Wilson